

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)	
)	
Petition of AT&T Inc. for Settlements Stop)	IB Docket No. 09-10
Payment Order on the U.S.-Tonga Route)	

ORDER

Adopted: June 15, 2009**Released: June 15, 2009**

By the Acting Chief, International Bureau:

I. INTRODUCTION

1. In this Order, we deny the request of AT&T for access, under a Protective Order, to the information redacted from the March 16, 2009 *ex parte* presentation filed by the Tonga Communications Corporation (TCC) in this proceeding.¹ In its recent petition to the Commission,² AT&T asserts that recent actions taken by TCC to disrupt the U.S.-international networks of AT&T and other U.S. carriers, for the purpose of forcing those carriers to agree to higher termination rates required by the Tonga Communications Minister, are anticompetitive and require action to protect U.S. consumers in accordance with Commission policy and precedent.³ In a separate Order we grant the petition filed by AT&T and order all U.S. carriers

¹ See Letter from James Talbot, General Attorney, AT&T, to Marlene H. Dortch, Secretary, Federal Communications Commission, IB Docket No. 09-10 (filed March 20, 2009). TCC filed a response to AT&T's request. See Letter from Joan M. Griffin, Counsel for TCC, to Marlene H. Dortch, Secretary, Federal Communications Commission, IB Docket No. 09-10 (filed March 26, 2009). AT&T filed a reply. See Letter from James Talbot, General Attorney, AT&T, to Marlene H. Dortch, Secretary, Federal Communications Commission, IB Docket No. 09-10 (filed April 2, 2009).

² See *AT&T Petition for Protection from Whipsawing and Stop Settlement Payment Order on U.S. Tonga Route*, IB Docket No. 09-10, at 2 (filed December 3, 2008) (*AT&T Petition*); see also *Petition for Protection from Whipsawing and Stop Settlement Payment Order on the U.S.-Tonga Route*, Public Notice, DA 09-149, IB Docket No. 09-10, (rel. Jan 29, 2009). AT&T filed its petition on December 3, 2008 requesting that the Commission take action to protect U.S.-international carriers from TCC's alleged anticompetitive behavior occurring on the U.S.-Tonga route. AT&T states that TCC's actions violate the Commission's longstanding policies against coercive, anticompetitive actions against U.S. carriers intended to force agreement to rate increases.

³ See *International Settlements Policy Reform: International Settlement Rates*, IB Docket Nos. 02-234 and 96-21, First Report and Order, 19 FCC Rcd 5709 (2004) (*2004 ISP Reform Order*). See also *AT&T Corp. Emergency Petition for Settlements Stop Payment Order and Request for Immediate Interim Relief and Petition of WorldCom, Inc. for Prevention of "Whipsawing" On the U.S.-Philippines Route*, IB Docket No. 03-38, Order on Review, 19 FCC Rcd 9993 (2004) (*Philippines Order on Review*); *AT&T Corp. Emergency Petition for Settlements Stop Payment Order and Request for Immediate Interim Relief and Petition of WorldCom, Inc. for Prevention of "Whipsawing" On the U.S.-Philippines Route*, IB Docket No. 03-38, Order, 18 FCC Rcd 3519 (IB 2003) (*Philippines Order*); *AT&T Corp. Proposed Extension of Accounting Rate Agreement for Switched Voice Service with Argentina*, Order, 11 FCC Rcd 18014, 18014, ¶ 1 (1996) (*Argentina Order*) ("The Commission will not allow (continued....)

providing facilities-based service to Tonga to suspend payments to TCC for termination services pending restoration of AT&T's and Verizon's circuits.⁴ We deny the AT&T request because the information is not necessary for the findings that we make in the Order granting AT&T's request to stop payment to TCC.

II. BACKGROUND

2. AT&T, in its petition, requested that the Commission issue an order, consistent with previous Commission actions and existing policy, directing all U.S. carriers to stop payments to TCC for termination services pending full restoration of the circuits disrupted by TCC for AT&T's failure to agree to higher termination rates.⁵ TCC, which is wholly owned by the government of Tonga, is a telecommunications carrier providing voice, data, Internet and cellular services in Tonga.⁶ TCC provides service pursuant to a telecommunications license issued by the Tonga Communications Minister.⁷ Another carrier, Digicel, is also licensed to provide telecommunications service in Tonga and "operates a GSM cellular network to provide international and domestic telecommunications services, Internet access and broadcast services."⁸

3. On January 29, 2009, the Commission issued a Public Notice seeking comments on the AT&T petition.⁹ TCC opposed the AT&T petition.¹⁰ On March 16, 2009, in an *ex parte* presentation, TCC presented to the Commission information regarding the details of TCC's rate to terminate traffic for its competitor in Tonga, Digicel, as well as details regarding TCC's and Digicel's universal service obligations in Tonga.¹¹ TCC voluntarily submitted this information subject to a request for confidential treatment pursuant to sections 0.457 and 0.459 of the Commission's rules.¹² The information was provided at the request of the International Bureau

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foreign monopolists to undermine U.S. law, injure U.S. carriers or disadvantage U.S. consumers."); *Sprint Communications Company, L.P., Request for Modification of the International Settlements Policy to Change the Accounting Rate for Switched Voice Service with Mexico*, Memorandum, Opinion and Order, 13 FCC Rcd 24,998, 25000-01, ¶ 6 (1998) (*Mexico Order*) ("The Bureau has strictly enforced the Commission's regulations against whipsawing."). See also *Cable & Wireless v. FCC*, 166 F.3d 1224, 1226 (D.C. Cir. 1999) ("The FCC has long sought to protect U.S. carriers and U.S. consumers from the monopoly power wielded by foreign telephone companies in the international telecommunications market.").

⁴ See *Petition for Protection from Whipsawing and Stop Settlement Payment Order on the U.S.-Tonga Route*, Order and Request for Further Comment, DA 09-1325, IB Docket No. 09-10, (rel. June 15, 2009). In that Order, we request further comment on whether the Commission should also issue a stop payment order to cease U.S. carrier payments to Digicel Tonga Ltd. (Digicel).

⁵ See AT&T Petition at 1, 5-8, 10.

⁶ See Opposition of TCC, IB Docket No. 09-10 at 2 (filed February 19, 2009) (TCC Opposition).

⁷ *Id.*

⁸ *Id.*

⁹ *Petition for Protection from Whipsawing and Stop Settlement Payment Order on the U.S.-Tonga Route*, Public Notice, DA 09-149, IB Docket No. 09-10, (rel. Jan 29, 2009).

¹⁰ See TCC Opposition.

¹¹ See Letter from Joan M. Griffin, Counsel for TCC, to Marlene H. Dortch, Secretary, Federal Communications Commission, IB Docket No. 09-10 (filed March 16, 2009).

¹² See *Id.* at 1; 47 C.F.R. §§ 0.457, 0.459.

staff, made in a March 11, 2009 *ex parte* meeting with TCC's counsel on the AT&T petition. On March 20, 2009, AT&T requested that the Commission provide access to the information redacted from the publicly filed version of TCC's March 16, 2009 *ex parte* letter.¹³ AT&T argues that access to the information submitted is necessary to have full opportunity to participate in this proceeding by having proper notice of, and an opportunity to comment on, all information submitted by TCC that may be relied upon by the Commission.¹⁴ AT&T states that it is willing to enter into a protective order limiting such disclosure to AT&T counsel actively engaged in the conduct of this proceeding.¹⁵

4. On March 26, 2009, TCC objected to AT&T's request for access to the redacted portions of its March 16, 2009 *ex parte* presentation.¹⁶ TCC maintains that the redacted portions of the March 16, 2009 *ex parte* presentation contain details of TCC's rate to terminate traffic for its competitor in Tonga, Digicel, as well as details regarding TCC's and Digicel's universal service obligations in Tonga.¹⁷ TCC states that the information provided to the Commission is non-public financial information that is not ordinarily disclosed to unrelated third parties because disclosure of this information could have adverse competitive consequences for TCC.¹⁸ Specifically, TCC claims that the information could be used by the carriers who are terminating (or who are interested in terminating) TCC's traffic to develop negotiating strategies to enhance their competitive position.¹⁹

5. TCC further argues that releasing the confidential information pursuant to a protective order does not satisfy a compelling public interest nor is the information a necessary piece of evidence that will resolve the issue before the Commission.²⁰ TCC urges that if the Commission were to release to a major U.S. carrier confidential financial information submitted by a foreign carrier, it would have a strong chilling effect on the willingness of other foreign carriers or their governments to provide sensitive information to the Commission at the Commission's request in the future.²¹

6. In response, AT&T argues for disclosure under a protective order because TCC has placed its costs at issue, that the redacted cost information is a necessary link in a chain of evidence on this issue, and that the Commission is required to balance public and private

¹³ AT&T filed a petition requesting access, under a protective order, to information redacted from TCC's March 16, 2009 *ex parte* presentation. See Letter from James Talbot, General Attorney, AT&T, to Marlene H. Dortch, Secretary, Federal Communications Commission, IB Docket No. 09-10 (filed March 20, 2009).

¹⁴ *Id.* at 1.

¹⁵ *Id.*

¹⁶ See Letter from Joan M. Griffin, Counsel for TCC, to Marlene H. Dortch, Secretary, Federal Communications Commission, IB Docket No. 09-10 (filed March 26, 2009).

¹⁷ *Id.* at 1.

¹⁸ *Id.* at 1-2.

¹⁹ *Id.* at 2.

²⁰ *Id.* at 2-3.

²¹ *Id.* at 3.

interests in favor of disclosure here.²² AT&T states that the redacted information comprises TCC's domestic interconnection rate with Digicel and the levy paid by TCC to the Tonga government on inbound international calls "to assist in setting up" a universal service obligation.²³ AT&T believes that it should have access to the information provided by TCC because it is a fundamental dispute of cost, and such a financial issue is the center argument of the petition.²⁴ AT&T believes that the disclosure of TCC's redacted information is required under the "balancing of public and private interests" that should be considered by the Commission in determining whether to release information subject to a FOIA exemption.²⁵ More importantly, AT&T argues that the broad restrictions sought by TCC are disproportionate to the narrow scope of potential competitive harm claimed to arise from disclosure of the redacted information.²⁶ AT&T claims that disclosure would be limited and those who would have access to the information would have to protect the information in accordance with the requirements of the protective order.²⁷ Thus, according to AT&T, there is no valid basis for concern by any foreign carrier or foreign government that sensitive information will be misused.

III. DISCUSSION

7. In this Order, we deny AT&T's request for access to review the redacted information TCC provided the Commission in its March 16, 2009 *ex parte* presentation for the reasons set forth below.

8. Pursuant to FOIA Exemption 4,²⁸ the Commission is permitted to withhold competitively sensitive commercial or financial information where release would cause substantial harm to the competitive position of the submitter of the information.²⁹ The Commission has the authority to withhold competitively sensitive information that falls within one or more of the nine exceptions from disclosure set forth under the FOIA act.³⁰ FOIA exemption 4 protects "trade secrets and commercial or financial information obtained from a person [that is] privileged or confidential."³¹ This exception protects the confidentiality of information which is obtained by the Commission, but which would customarily not be released to the public by the person from whom it was obtained.³² In *Critical Mass II*, the D.C. Circuit found an even stronger presumption for confidential treatment when, as is the case here, the

²² Letter from James Talbot, General Attorney, AT&T, to Marlene H. Dortch, Secretary, Federal Communications Commission, IB Docket No. 09-10 at 1-2 (filed April 2, 2009).

²³ *Id.* at 1.

²⁴ *Id.* at 1-2.

²⁵ *Id.* at 2.

²⁶ *Id.* at 2-3.

²⁷ *Id.* at 3.

²⁸ 5 U.S.C. § 552(b)(4).

²⁹ *Examination of Current Policy Concerning the Treatment of Confidential Information Submitted to the Commission*, 13 FCC Rcd 24816, 24818-20 (1998) (Confidential Information Order).

³⁰ *Id.* at 24818.

³¹ *Id.*; 5 U.S.C. § 552(b)(4).

³² *See Critical Mass Energy Project v. NRC*, 975 F.2d 871,873 (1992).

information was voluntarily submitted, and disclosure of that information would jeopardize the ability to obtain such data on a cooperative basis.³³

9. While we do not compel any foreign carrier to provide cost data, the Commission's Benchmark policy provides an opportunity for a foreign carrier to seek revision of a settlement rate benchmark with which U.S. carriers are to adhere by providing cost data to demonstrate that the applicable benchmark does not permit recovery of the incremental costs incurred to receive, transmit, and terminate international service.³⁴ The Commission noted in its *Benchmark Order*, that its rules permit a foreign carrier to request confidential treatment of cost data submitted to the Commission.³⁵ In this case, TCC made such a request when it voluntarily submitted the information in its March 16, 2009 *ex parte* presentation.³⁶

10. In this instance, we believe that the information provided by TCC is confidential commercial financial information and it is necessary for us to protect the confidentiality of this information. We agree with TCC that releasing the requested confidential information under a protective order could have a potential chilling effect on the willingness of foreign carriers to provide information to the Commission in the future, particularly, when, as in this case, there may be a need for government-to-government discussion to ultimately resolve the controversy which is the subject of AT&T's petition. Based on the facts in this case, the Bureau has carefully weighed and balanced the potential chilling effect of providing the redacted information to AT&T under a Protective Order against the need for the information in making a decision regarding the stop payment request. In this case, we find that the balance favors denial of the request for a Protective Order because the information requested is not necessary for our decision in the stop payment proceeding; the Bureau has granted AT&T's petition without consideration of the specific information that it seeks. We note that our conclusion is based on the specific circumstances in this case, and may be different in another context. We would consider releasing the redacted information under a protective order with appropriate conditions if new issues are raised or claims made in this proceeding that require us to consider specifically this information.

IV. ORDERING CLAUSES

11. For the reasons discussed above, accordingly, IT IS ORDERED that the request of AT&T for access to confidential information redacted from the March 16, 2009 *ex parte* presentation filed by TCC is hereby DENIED.

³³ *Id.*

³⁴ See *Benchmarks Order*, 12 FCC Rcd at 1842-3, ¶ 74, 88.

³⁵ *Id.* at ¶ 89 (citing 47 C.F.R. § 0.059).

³⁶ See Letter from Joan M. Griffin, Counsel for TCC, to Marlene H. Dortch, Secretary, Federal Communications Commission, IB Docket No. 09-10 (filed March 16, 2009).

12. This Order is issued pursuant to Section 4(i) of the Communications Act of 1934, as amended, 47 U.S.C. § 154(i), Section 4 of the Freedom of Information Act, 5 U.S.C. § 552(b)(4), and authority delegated under Section 0.261 of the Commission's rules, 47 C.F.R. § 0.261, and is effective upon its adoption.

FEDERAL COMMUNICATIONS COMMISSION

John V. Giusti
Acting Chief, International Bureau